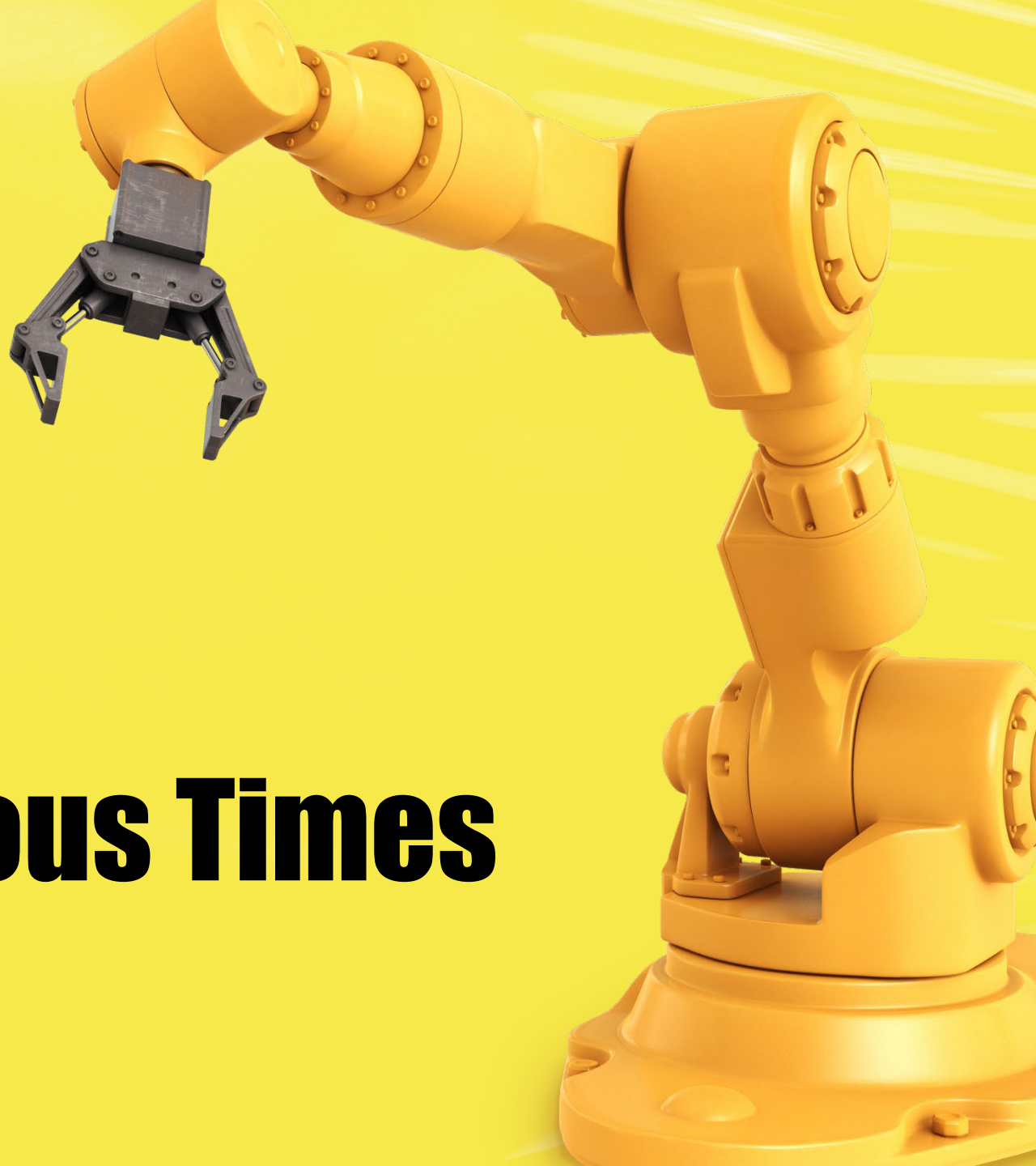


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Managing DEI During Tumultuous Times

May 2024 • Michael Thomas

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Presenter

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Principal • Jackson Lewis

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Agenda

The DEI Analytical Framework

SCOTUS: Students for Fair Admissions v. Harvard

DEI Push and Pull

Mitigation Strategies

The DEI Analytical Framework



Legal Authorities at Issue

Title VII

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to discriminate in hiring, firing, compensation, terms, conditions, or privileges of employment on the basis of race, color, religion, sex, or national origin.

Section 1981

Section 1981 of the Civil Rights Act of 1866 prohibits discrimination on the basis of race, color, and ethnicity when making and enforcing contracts. Section 1981 specifically grants all individuals within the US jurisdiction the same rights and benefits as "enjoyed by white citizens" regarding contractual relationships (42 U.S.C. § 1981(a)).

Executive Order 11246

The Executive Order prohibits federal contractors and federally-assisted construction contractors and subcontractors, who do over \$10,000 in Government business in one year from discriminating in employment decisions on the basis of race, color, religion, sex, sexual orientation, gender identity or national origin. The EO also requires Government contractors to take affirmative action to ensure that equal opportunity is provided in all aspects of their employment.



The Decision Was About Student Admissions

SFFA alleged Harvard's admissions policy intentionally discriminates against Asian-American applicants

SFFA alleged that UNC's admissions process unfairly uses race to prefer underrepresented minority applicants to the detriment of White/Caucasian and Asian American applicants

Oral arguments were in October, decision issued June 29, 2023



The Holding

Using race in admissions violates the Equal Protection Clause

Using race in admissions does not pass strict scrutiny standard

Programs are not “sufficiently measurable to permit judicial review’ under the rubric of strict scrutiny”

“[c]lassifying and assigning’ students based on their race ‘requires more than . . . an amorphous end to justify it.”



Justice Gorsuch's Concurrence: The Law Next Door

“If this exposition sounds familiar, it should. Just next door, in Title VII, Congress made it ‘unlawful...for an employer...to discriminate against any individual...because of such individual’s race, color, religion, sex or national origin.’”

Mixed Messages from EEOC Commissioners

EEOC Chair Charlotte Burrows (D)

“[T]he decision...does not address employer efforts to foster diverse and inclusive workforces or to engage the talents of all qualified workers, regardless of their background. **It remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace.**”

EEOC Commissioner Andrea Lucas (R)

“And today's ruling only heightens those employers' practical risks by reemphasizing the Supreme **Court's rejection of diversity, nebulous "equity" interests, or societal discrimination as justifying actions motivated- even in part-by race, sex, or other protected characteristics.** Companies continuing down this path after today may violate federal antidiscrimination laws.”

Push to Advance DEI Programs

Vast majority of employment discrimination plaintiffs are members of underrepresented groups

Discrimination against the under-represented remains an issue, often when there is statistically-demonstrated underrepresentation

Particularly when there is statistically-demonstrable underrepresentation, increasing representation remains a business imperative for talent, effective business decision-making

NASDAQ Rule requiring NASDAQ companies to disclose board diversity data

SEC recently published two DEI reports: Movement afoot at SEC to require companies to report demographic data on workforce to investors and there is pending EEO guidance

State legislation asking for greater transparency

AG's Letter

Most are continuing DEI programs, supported by their employees, customers, shareholders, investors and economics

The Pull Back From DEI Programs

Challenges come from various places

1. July 13, 2023 – 13 AGs sent Fortune 100 CEO letters
2. Individual plaintiffs, but mostly organizations
3. State legislation banning different forms of DEI
4. Students for Fair Admissions, Alliance for Fair Board Recruitment, American Alliance for Equal Rights (AAER) – Edward Blum
5. American First Legal Foundation– Stephen Miller

A Short List of DEI Programs Under Attack

1. Goals
2. Diverse interview slates
3. Internship & fellowship programs
4. Scholarship programs
5. Leadership or skill development programs
6. Recruitment, retention, and promotion programs
7. Target 3rd party programs-diverse supplier initiatives
8. Shareholder derivative actions
9. Compensation tied to D&I results
10. Tracking/dashboards and DEI demographic data
11. ERGs/affinity Groups/BRGs
12. Board Diversity

Common DEI Issues Under Attack and Mitigation Strategies

1. Aspirational Goals
2. Protected Class Restricted Programs
3. Public Data Disclosure
4. Retention Programs
5. Internships
6. 3rd Party Programs-With Protected Class-Based Eligibility Restrictions
7. Supplier Diversity

What Can We Do

Safe Practices

1. Expand outreach
2. Conduct diagnostics to evaluate policies, practices, programs
3. Review barriers to entry and advancement in job descriptions, policies, practices
4. Focus on inclusion and wellness
5. Listen to employees and address concerns
6. Train on bias and implement structural changes to interrupt it
7. Become active in situation management...So it does not require crisis management

Get the Easy (Easier?) Stuff Right

The Low Hanging Fruit

1. Ensure all involved that hiring, promotion understand that any employment decisions are based on legitimate, nondiscriminatory reasons
2. Ensure process for handling complaints, concerns are in place
3. Train the various constituents on what they need to know
4. Survey employees on inclusion
5. Analyze recruitment, hiring, retention and promotion practices to eliminate barriers or bias
6. Focus on inclusion and wellness
7. Train on legal guardrails and inclusion
8. Communicate clearly verbally and in what you publish.
9. Listen to your employees!

Risk Assessment

High Risk Employment Decisions to Avoid

1. Race/gender conscious employment decisions
2. Quotas, set asides, preferences, plus-factors
3. Exclusive practices
4. Aggressive targets
5. Short timelines to accomplish goals

THANK YOU



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About Jackson Lewis

Firm Overview

- We represent management exclusively in every aspect of employment, benefits, labor, and immigration law and related litigation.
- As leaders in educating employers about the laws of equal opportunity, we understand the importance of having a workforce that reflects the various communities we serve.
- With 61 locations and more than 1,000 attorneys, we offer local knowledge backed by the support of a national firm.
- We are founding members of L&E Global, a global alliance of premier employer's counsel firms.

We get work.®

Employees need proactive strategies and business solutions that reduce workplace law risk. At Jackson Lewis, we don't just tell you what's legal – we tell you what's **effective**.

JacksonLewis

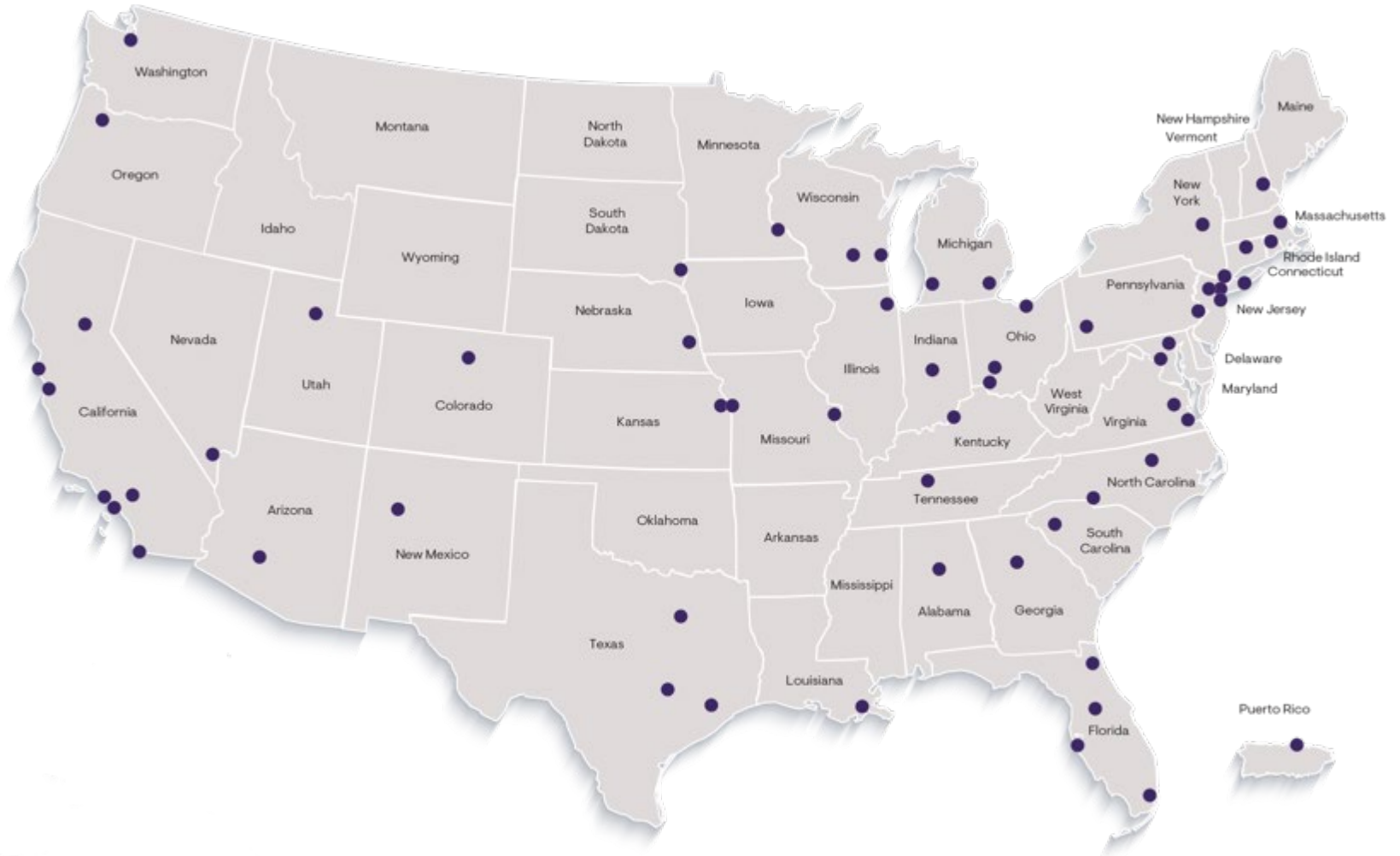
Strategically Located to Serve Employers' Needs

61

Locations Nationwide

1,000+

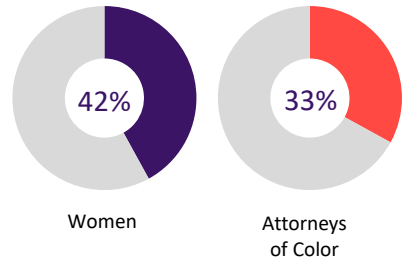
Attorneys



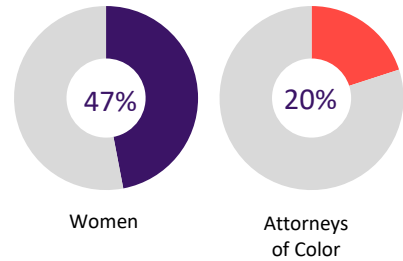
Diversity, Equity & Inclusion at JL

As of December 31, 2023

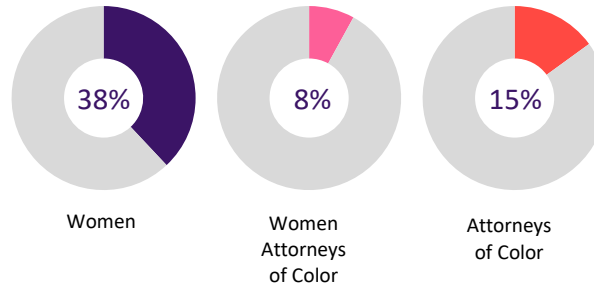
Our Elected Board of Directors



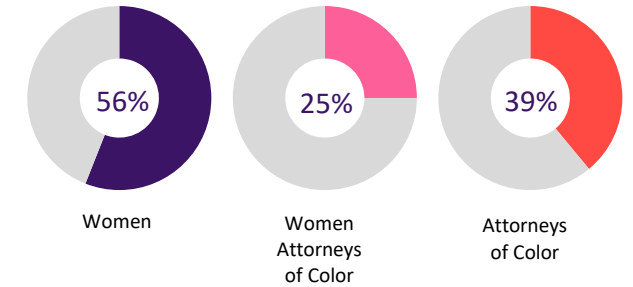
Our Elected Advisory Committee



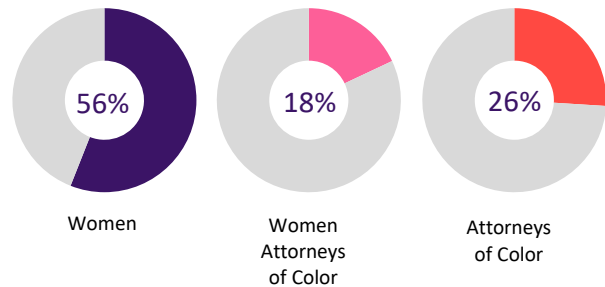
Our Principals



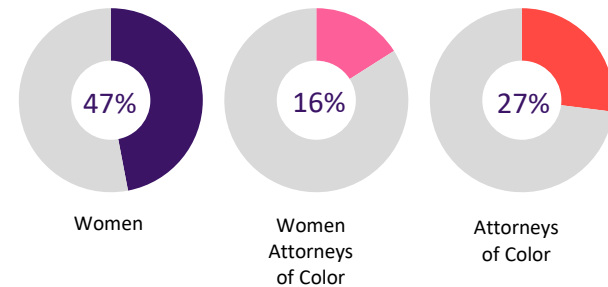
Our Associates



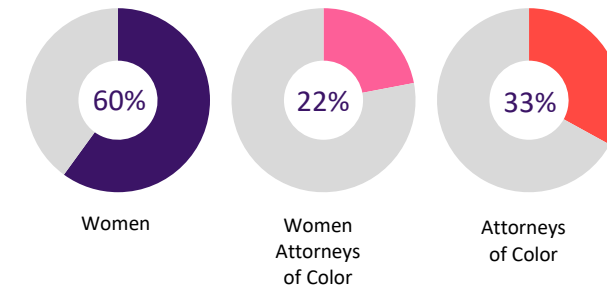
Our 2023 Elevated Principals



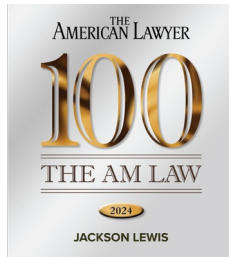
Our Attorneys



Our Workforce



National Recognition



Client Service Standards

Jackson Lewis is committed to providing every client with the highest level of service. We promise our clients that Jackson Lewis will:



Demonstrate an Unmatched Understanding of Your Needs and Expectations



Commit to Fostering Diverse Teams and the Creative Ideas They Generate



Embrace Proactive Communication and Collaboration as a Way of Life



Provide Regular Opportunities for Formal and Informal Feedback and Act Upon the Results



Build a True Partnership Where Goals are Shared and Success is Mutual

Practice & Industry Groups

Advice and Counsel

Affirmative Action, OFCCP and
Government Compliance

California Advice and Counsel

Class Actions and Complex
Litigation

Construction

Corporate Diversity Counseling

Corporate Governance and
Internal Investigations

Disability, Leave and Health
Management

Employee Benefits

Environmental, Social and
Governance

ERISA Complex Litigation

Financial Services

Healthcare

Higher Education

Hospitality

Immigration

International Employment

Labor Relations

Life Sciences

Litigation

Manufacturing

Pay Equity

Privacy, Data and Cybersecurity

Real Estate

Restrictive Covenants, Trade
Secrets
and Unfair Competition

Retail

Sports

Technology

Transactional Services

Trials and Appeals

Wage and Hour

Workplace Safety

Workplace Training